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No. 87-331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL K. DEAVER,
Petitioner,
v.
CABLE NEWS NETWORK, INC., *et al.*,
Respondents.

BRIEF OF THE WASHINGTON POST COMPANY AND THE NEW YORK TIMES COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly applied this Court's decision in *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984), in holding that the privacy interests of prospective jurors in a criminal case could not justify excluding the public from their *voir dire* examination, when the trial court (1) failed to "requir[e] the prospective juror[s] to make an affirmative request" for *in camera voir dire*, *id.* at 512, (2) failed to make any findings concerning the privacy interests of individual prospective jurors, and (3) failed to consider alternatives that might minimize the degree of closure.

RULE 28.1 LISTING

The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent The Washington Post Company:

Bowater Mersey Paper Company, Limited
International Herald Tribune, S.A.
Los Angeles Times—Washington Post News Service, Inc.
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The following are parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent The New York Times Company:

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STATEMENT OF THE CASE

Petitioner asks this Court to review a unanimous, summary reversal of the district court's closure of the *voir dire* examination of individual prospective jurors in his trial for perjury. *United States* v. *Deaver*, No. 87-0096 (D.D.C.).

On July 13, 1987, the *voir dire* began with the district court's announcing to the prospective jurors that it would "do all that is possible in the circumstances to protect your privacy." Appendix to the Petition for a Writ of Certiorari ("Pet. App.") 25a. After some preliminary questioning, the court asked each member of the jury panel to fill out a questionnaire containing thirty-seven questions. The court told the prospective jurors that they would then be

brought individually into the jury room "where, in privacy, counsel and [the court] can ask you any further appropriate questions which your answer[s] on the questionnaire may suggest . . . ." Pet. App. 26a. The questionnaires themselves were to be sealed "at least until the conclusion of the case." *Ibid.*

The juror questionnaires included a number of questions that are routinely asked of prospective jurors, and additional questions relating more particularly to the nature of petitioner's case. See Pet. App. 83a. For example, the prospective jurors were asked for such routine background information as the length of their residence in the District of Columbia, their education, their marital status, their employment and the employment of their immediate family members, and any major health problems. They were also asked, as prospective jurors routinely are, whether they had ever participated in a criminal or civil trial in any capacity, whether they or any relative had ever worked in the field of law or law enforcement, whether they had any opinions about persons engaged in those fields, and whether they had ever been victims of crime or charged with a crime.

Because the defendant was a former member of President Reagan's White House staff, now engaged in public relations and political consulting, the prospective jurors were asked whether they had any personal opinions about politicians, high government officials, the Reagan administration, or persons engaged in the fields of public relations and political consulting. Presumably for similar reasons, the prospective jurors were asked to state their political affiliation and to indicate whether they were active

politically. They were also asked questions that are routinely asked in cases that have attracted some publicity—what newspapers or news magazines they read regularly, what TV or radio news programs they watch or listen to regularly, whether they had heard or read about the case and, if so, whether they had formed any opinions based upon the publicity. Presumably anticipating a potential defense in the case, the court also inquired whether the prospective jurors, or any of their relatives or close friends, had ever suffered from alcoholism or drug addiction.

After the prospective jurors had completed their questionnaires, counsel for The Washington Post Company called the court's attention to *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"). Thereafter, the court told the jury panel that because of "a recent decision of the Supreme Court," it could not keep the questionnaires sealed, unless it made specific findings with respect to individuals' responses. Pet. App. 31a. Nevertheless, the court continued with its plan to examine the prospective jurors on their questionnaires in private, releasing only a transcript of the questioning with any sensitive material redacted.

In conferences in chambers with the district judge, counsel for the Post and counsel for the television networks (CNN, ABC, CBS and NBC) objected to the closure of the proceedings. After the court had an opportunity to reflect overnight upon *Press-Enterprise I*, it announced the next morning that it would "allow the individual panel members to elect whether or not they wish[ed] further questioning having to do with their answers to the questions to be conducted in the jury room or in open court." Pet. App. 37a.

The Post and the television networks, joined by The New York Times Company and the Associated Press, objected on the record that the decision whether *voir dire* was to be conducted in private should not be left entirely to the prospective jurors. They argued that after an individual made a specific request for *in camera* questioning, the court was required to make a specific determination of an overriding interest supporting closure of that individual's *voir dire* examination. Pet. App. 47a-48a.

The court rejected that argument. It ruled instead that it would exclude the public from the examination of all potential jurors who preferred private questioning based upon its general finding that *all* such jurors had "a compelling interest" in the privacy of their responses to "many" questions on the questionnaire—"including but not limited to those questions relating to their political affiliation, their personal and familial experiences with crime and substance abuse and their medical histories." Pet. App. 37a.

Consequently, the court instructed the panel members as follows:

> I am aware that, for a number of you, that the answers you have given to those questionnaires are sensitive and personal information and you might not desire either to have that information revealed here in open court nor to answer any further questions that counsel might want to put to you in connection with the answers that you have given.
>
> *I am going to leave it largely to your discretion as to whether or not you are willing to be interrogated here in open court as to your question-*

> *naires or whether you would prefer to have further questions put to you in the jury room*, on the record, of course, and with counsel present, but, nevertheless, in the jury room.

Pet. App. 57a-58a (emphasis added). The court then stated that anyone who was willing to be questioned in open court should identify himself to the marshals and leave the court room, to be called back at a later time. Predictably, only five of approximately thirty potential jurors volunteered to leave the room and to be examined at a later time in open court. The remaining members of the panel said nothing, and were therefore to be examined in the jury room. Pet. App. 59a-61a.

Counsel for the press objected once again that the court's procedure was inconsistent with *Press-Enterprise I*, in that it left the question of closure entirely to the prospective jurors' discretion, and that it reversed this Court's requirement that a prospective juror make an "affirmative request" for private questioning by requiring instead that prospective jurors volunteer for public questioning. Pet. App. 64a-65a. The court overruled those objections, stating that it "intend[ed] . . . to place the onus" of coming forward on those members of the panel who were willing to be questioned in public. Pet. App. 73a.

The same day, the Post and the Times, and the television networks, filed separate emergency appeals and motions for summary reversal. The court of appeals immediately ordered the parties to show cause why the district court should not be summarily reversed. The following day, July 15, 1987, the panel heard argument, and unanimously reversed the district court in a *per curiam* opinion. The court held:

> The District Court's order fails to meet any of the three conditions articulated in *Press-Enterprise* for closure of *voir dire*.
>
> First, the District Court had no evidence in the record and made no findings that public interrogation of any individual member of the *voir dire* would "touch[] on deeply personal matters that [the juror] has legitimate reasons for keeping out of the public domain." *Press-Enterprise*, 464 U.S. at 511. . . .
>
> * * * *
>
> Second, the District Court did not, as *Press-Enterprise* demands, "requir[e] the prospective juror[s] to make an affirmative request" for an *in-camera voir dire* interview. *Id.* at 512. . . . The District Court, in our view, stood this requirement on its head by permitting prospective jurors to elect closed *voir dire* simply by remaining mute. . . .
>
> Third, the District Court acted apparently without considering alternatives that might minimize the degree of closure. *Cf. id.* at 513. By way of obvious example, the District Court could have conducted *voir dire* in open court, responding to individual expressions of specific concern over particular questions by permitting interrogation *in camera* where warranted under prevailing law.

Pet. App. 9a-13a.

The court of appeals directed the district court to conduct further *voir dire* proceedings in accordance with its opinion. It did not order, and the press representatives did not request, that the district court abort the proceedings and begin *voir dire* again.

Nevertheless, the district judge decided to dismiss the jury panel and to begin the proceedings at a later date with a new panel.

The court of appeals subsequently denied petitions for panel rehearing and for rehearing *en banc*. Pet. App. 21a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Applied This Court's Decision in *Press-Enterprise I*

The court of appeals' opinion did not rest upon any novel or controversial ruling of law, nor did it break new ground or expand existing precedent. Rather, as petitioner notes, it "was based completely on the strict standards for closure of *voir dire* proceedings established by this Court in *Press-Enterprise I*." Pet. 25-26. And as the court of appeals noted, the correct application of those standards to this case was "so clear that summary reversal [was] appropriate." Pet. App. 8a.

In *Press-Enterprise I* this Court reversed the partial closure of *voir dire* in a highly-publicized rape trial. The trial court had decided, in order to protect jurors' privacy and encourage the candor necessary to a fair trial, that it would hold *voir dire* in two stages. The public would be permitted to attend the "general *voir dire*," but would be excluded from individual questioning, and the transcript of the individual questioning would be sealed. 464 U.S. at 503-04. Upon challenge by the press, this Court found that the closure of the *voir dire* and the suppression of the transcript violated the constitutional right to public proceedings in criminal trials. The Court held

that *voir dire* is a part of the criminal trial to which a presumption of openness attaches, and that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." 464 U.S. at 510.

When, as in the *Press-Enterprise* case and in this case, closure is sought to protect juror privacy, the Court established three requirements: First, to "minimize the risk of unnecessary closure," the court must require a prospective juror to make an "affirmative request" to be questioned in private. *Id.* at 512. Second, the court must make specific findings on the record that questioning the juror in open court would threaten his legitimate privacy interest. *Id.* at 510. Finally, the court must consider whether alternatives less drastic than closure are available. *Id.* at 511.

The district court in this case did not comply with any of those requirements. It did not require prospective jurors to make any "affirmative request" to be questioned privately. Indeed, in the words of the court of appeals, the court "stood this requirement on its head by permitting prospective jurors to elect closed *voir dire* simply by remaining mute." Pet. App. 13a.

Nor did the district court have any evidence, or make any findings, with respect to the privacy interests of any particular prospective jurors. The court supported its closure order only with a blanket finding with respect to all prospective jurors, noting that "there [was] a high probability that as to each juror there [would be] at least one question which

he or she would prefer not to have to utter in open court from the witness stand." Pet. App. 41a-42a. The court explained that it was not required to rule on the legitimacy of individual jurors' claims, because the court "d[id] not read *Press-Enterprise* that way," Pet. App. 50a, and because such individualized determinations were impossible anyway:

> It is not possible for me to exercise discretion in any objective fashion as to what is or is not to be private . . . . What is sensitive, personal information for each of these respective jury members is a matter which is entirely within their own hearts. They have to decide what is personal, what they do not want to reveal and what they are willing to reveal but do not want to stand up and proclaim in open court, and I have to trust to their judgment . . . .

Pet. App. 73a-74a.

Finally, as the court of appeals noted, the district court did not consider "alternatives that might minimize the degree of closure," such as limiting *in camera* questioning to those areas in which specific privacy concerns might warrant closure. Pet. App. 13a. The district court noted simply that there would probably be "at least one question" which each juror would rather not have to answer in open court. Prospective jurors, however, were to be questioned in private on *all* areas embraced by the questionnaires —including, for example, the length of their residence in the District of Columbia, their education, their occupation, their marital status, their reading habits, and their opinions about law enforcement officials, politicians and those engaged in public relations. See Pet. App. 42a-44a.

Petitioner argues that the threefold requirements of *Press-Enterprise I* do not apply to this case because a transcript of the *voir dire* proceedings was made available in this case, whereas *Press-Enterprise I* "involved the complete closure of *voir dire* for six months and the total denial of media access to *any* information about those proceedings." Pet. 26.

Petitioner, however, misstates the facts of *Press-Enterprise I*—the *voir dire* was closed for six weeks, not six months, and the public was permitted to attend its initial stages. 464 U.S. at 503. More imporantly, petitioner misconceives the holding in *Press-Enterprise I*. This Court did not merely articulate the standards required to justify sealing a *voir dire* transcript; it spoke of the right to "open public proceedings in criminal trials," 464 U.S. at 503, and set standards for closing *voir dire* proceedings. Petitioner cites the Court's statement that "[w]hen limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time." 464 U.S. at 512. But that statement does not suggest that closure may be ordered without requiring an affirmative request by a prospective juror, without making any particularized finding as to an overriding privacy interest, and without considering less drastic alternatives. In fact, in the immediately preceding sentences, the Court emphasized that the requirement of an affirmative request for *in camera* examination was intended to "minimize the risk of unnecessary closure." *Id.* at 512. The Court even suggested that excusing an individual panel member

from jury service may be preferable to partial closure. *Ibid.*

In short, this Court did not hold that the mere provision of a *voir dire* transcript is a substitute for holding *voir dire* in open court. Rather, the Court held that when findings have been made to support closure, the Court should then consider whether the transcript can be made available at a later time to minimize the injury to the public. In this case, the district court failed altogether to make the findings required to justify closure in the first place.

This Court's earlier decision in *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), also rejected any notion that provision of a transcript is an adequate substitute for allowing the public to attend criminal proceedings. In that case, the court invalidated a statute excluding the public from the courtroom during the testimony of minor victims of sex offenses—testimony far more likely to implicate substantial privacy concerns than the *voir dire* examination in this case—even though, as the court noted, the public was "not denied access to the transcript." *Id.* at 610.[1]

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[1] "[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the court room." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring in the judgment); *see also Publicker Industries, Inc.* v. *Cohen*, 733 F.2d 1059, 1072 (3rd Cir. 1984) ("a district court in deciding whether to conduct a proceeding *in-camera* must not relax the standard necessary to close a proceeding simply because a transcript of that closed proceeding can be made available at a later date").

Petitioner complains that the court of appeals' opinion "reads . . . the defendant's constitutional right to trial by a fair and impartial jury . . . out of the caselaw." Pet. 25. The result of the court's decision, he contends, is that "a criminal defendant now has a constitutional right to select a fair and impartial jury only to the extent that such selection process does not infringe in any way on the media's right to be present at the time." Pet. 22. The court of appeals, however, said no such thing, and it is a gross distortion of the court's opinion to suggest that it reads the right to a fair trial out of the law. The court of appeals made clear, as this Court did in *Press-Enterprise I*, that *voir dire* may be closed if the trial court "make[s] findings that an open *voir dire* proceeding threatens either the defendant's Sixth Amendment right to a fair trial or a prospective juror's privacy interests." Pet. App. 7a. In addition, of course, the court must consider available alternatives to closure and, to the extent juror privacy is involved, must require prospective jurors to make an "affirmative request" for private examination. Pet. App. 7a-8a.[2]

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[2] Since the petitioner criticizes the court of appeals for giving inadequate attention to the defendant's right to a fair trial, it should be noted that the district court's closure of the *voir dire* examination was based almost exclusively on the jurors' purported privacy interests, not the defendant's interest in a fair trial. The court repeatedly invoked the general privacy interests of prospective jurors to support closure. See Pet. App. 26a, 32a-33a, 37a-38a, 41a-45a, 48a-49a, 57a-61a. The only finding that the district court made was that "many questions on the jurors' questionnaire . . . give rise to a *compelling interest of the prospective jurors* in keeping

In this case, the court of appeals concluded simply that the district failed to follow the procedures and make the findings required for closure. There is nothing about that conclusion that warrants review by this Court.

II. There Is No Split among the Circuits

Petitioner argues that there is a "clear" and "direct" conflict among the circuits. Pet. 28. But he does not specify the precise issue on which the circuits are said to be split. Petitioner appears to argue that the public's interest in access to *voir dire* proceedings is satisfied fully if the press is given access to the transcripts and juror questionnaires. When that occurs, petitioner argues, "the Fourth and Fifth Circuit have held . . . the media [is] entitled to no more." Pet. 34. Those circuits do not—and under *Press-Enterprise I* could not—so hold. The cases

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their answers . . . out of the public domain." Pet. App 37a (emphasis added).

Although the court made passing reference to its desire to ensure "a fair trial and the privacy rights of these jurors," Pet. App. 38a; see also Pet. App. 75a, it made no specific findings with respect to any threat to the defendant's right to a fair trial. As this Court has emphasized, "[i]f the interest asserted is the right of the accused to a fair trial, the [proceedings] shall be closed only if *specific* findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." *Press-Enterprise Co.* v. *Superior Court of California*, 106 S. Ct. 2735, 2743 (1986) (*Press-Enterprise II*) (emphasis added).

cited, to the extent they are relevant at all, are consistent with the present case.

In *United States* v. *Edwards*, 823 F.2d 111 (5th Cir. 1987), the court held that no presumption of openness attached to mid-trial proceedings inquiring into possible juror misconduct—proceedings which the court noted "have traditionally been closed to the public." *Id.* at 116-17. In so holding, the *Edwards* court specifically distinguished mid-trial interviews from *voir dire* proceedings of the sort at issue in this case. *Id.* at 117.

Petitioner relies upon that portion of the *Edwards* opinion holding that there is "a limited right of access to the record of closed [mid-trial] proceedings concerning potential jury misconduct and . . . a presumption that the transcript of such proceedings will be released within a reasonable time." *Id.* at 118. Contrary to petitioner's apparent contention, however, the court did not hold that providing a transcript fully satisfied the right of access to proceedings, such as jury *voir dire*, that are themselves presumptively open. The provision of a transcript in *Edwards* was considered an adequate substitute for attendance at a proceeding to which the court held "no presumption of openness attaches." *Id.* at 117.

Nor does the law of the Fourth Circuit conflict with the court of appeals' decision in this case. The Fourth Circuit has explicitly "adopt[ed] . . . as prerequisites to a closure order in a criminal proceeding" the requirements that the court give the public prior notice and opportunity to be heard, that the court state its reasons for closure "on the record, supported by specific findings," and that the court

"also state its reasons on the record for rejecting alternatives to closure." *In re Knight Publishing Co.*, 743 F.2d 231, 234-35 (4th Cir. 1984) (citation omitted). *See also In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) (applying *Knight Publishing* to reverse a closure order based on national security for failure to make requisite findings).

Petitioner claims a conflict with the Fourth Circuit's earlier decision *In re Greensboro News Co.*, 727 F.2d 1320 (4th Cir.), *cert. denied*, 469 U.S. 829 (1984). That case was decided initially the day before *Press-Enterprise I*, see 727 F.2d at 1327, and was not relied upon in the Fourth Circuit's subsequent decision *In re Knight*.[3] Even assuming its vitality as a precedent, it does not conflict with the court of appeals' application of *Press-Enterprise I* in this case.

In *Greensboro News*, the court of appeals approved the exclusion of the public from *voir dire* examination of potential jurors for reasons entirely different from those that prompted the district court to close *voir dire* in this case. The principal concern in *Greensboro News* was not juror privacy, but rather the threat to a fair trial that would result if potential jurors' answers to *voir dire* questions about pretrial

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[3] The Fourth Circuit has cited *Greensboro News* only twice—once for the proposition that a riot "generated a substantial amount of media attention," *In re Russell*, 726 F.2d 1007, 1008 (4th Cir. 1984), and once for the historical proposition that that court had "independently arrived at the same conclusion with respect to *voir dire* [as *Press-Enterprise I*] at approximately the same time." *In re Washington Post Co.*, 807 F.2d at 388 n.5.

publicity became known to other prospective jurors. See 727 F.2d at 1328. All parties agreed in that case that the examination of each individual prospective juror on the question of pretrial publicity had to be conducted outside the presence of other potential jurors. *Id.* at 1321. Because of what it felt to be the "nearly unique" and "extraordinary nature of the case," *id.* at 1322 n.4, 1328 n.4, the trial court believed that exclusion of the public was necessary to prevent prospective jurors from learning about the responses of others. *Id.* at 1323, 1325. The court also noted that the case involved highly publicized allegations that members of the Ku Klux Klan and the National Socialist Party of America had conspired to shoot participants in an anti-Klan parade, and that potential jurors who believed those organizations are prone to violence might be reluctant to express their opinions in open proceedings because of the fear of retribution. *Id.* at 1325.

Regardless of whether the court's decision to close the *voir dire* proceedings was correct in the circumstances of the *Greensboro News* case, that court's decision certainly does not conflict with the court of appeals' decision in this case. The court in *Greensboro News* explicitly required findings of a substantial probability that (1) irreparable damage to the defendant's fair trial right would result from public *voir dire* proceedings, (2) alternatives to closure would not adequately protect the defendant's right to a fair trial, and (3) closure would be effective in protecting against the perceived harm. *Id.* at 1325. Those standards, articulated the day before *Press-Enterprise I* was decided, closely parallel the stand-

ards contained in *Press-Enterprise I* and applied by the court below.[4]

The court of appeals' decision in this case is also consistent with the decision of the Seventh Circuit in *United States* v. *Peters*, 754 F.2d 753 (1985). In that case, the court of appeals applied *Press-Enterprise I* to reverse an order excluding the public from *voir dire* proceedings, even though a transcript was made available at court expense after the *voir dire* was concluded.

In sum, there is no conflict among the circuits on the appropriate standards for excluding the public from *voir dire* proceedings.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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[4] After this Court issued its decision in *Press-Enterprise I*, the *Greensboro News* court issued a supplemental opinion noting that it "did not . . . regard *Press-Enterprise Co.* as particularly close or relevant to the *Greensboro News Co.* case." 727 F.2d at 1327-28.